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Administrative Review
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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum: Final Results of
Countervailing Duty Administrative Review: Certain In-shell
Roasted Pistachios from the Islamic Republic of Iran

SUMMARY:

We have analyzed the comments of interested parties in the final results of the above-mentioned countervailing duty (CVD) administrative review covering the period of review (POR) January 1, 2003, through December 31, 2003. The "Analysis of Programs" section below describes the decisions made in this review. Also below is the "Analysis of Comments" section, which contains the Department of Commerce's (the Department's) response to the issues raised in the briefs. We recommend that you approve the positions we have developed in this memorandum. Below is a complete list of the issues in this review for which we received comments from parties.

- Comment 1: Termination of the Review
- Comment 2: Application of Adverse Facts Available to the Provision of Credit Program
- Comment 3: Application of Adverse Facts Available to the Provision of Fertilizer and Machinery Program
- Comment 4: Application of Adverse Facts Available to the Tax Exemptions Program
- Comment 5: Application of Adverse Facts Available to the Provision of Water and Irrigation Equipment Program
- Comment 6: Application of Adverse Facts Available to the Technical Support Program
- Comment 7: Application of Adverse Facts Available to the Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods Program
- Comment 8: Application of Adverse Facts Available to the Program to Improve Quality of Exports of Dried Fruit

- Comment 9: Application of Adverse Facts Available to the Iranian Export Guarantee Fund
Comment 10: Application of Adverse Facts Available to the GOI Grants and Loans to Pistachio Farmers Program
Comment 11: Application of Adverse Facts Available to the Crop Insurance for Pistachios Program
Comment 12: Adherence to the Department's Deadlines and Service Requirements

I. Analysis of Programs

On October 31, 2005, in the preliminary results of this review, we found, based on the information supplied by Tehran Negah Nima Trading Company, Inc., trading as Nima Trading Company (Nima), on behalf of itself and its grower, Razi Domghan Agricultural and Animal Husbandry Company (Razi), that nine of the ten programs at issue in the instant review were not used during the POR. See Certain In-shell Roasted Pistachios from the Islamic Republic of Iran: Preliminary Results of Countervailing Duty Administrative Review, 70 FR 67453 (November 7, 2005) (Preliminary Results).

Parties have commented on our Preliminary Results. Moreover, based on information received from Nima and Razi since the issuance of our Preliminary Results, we have made changes to these final results.

In our Preliminary Results, we preliminarily found that the provision of credit was used by Nima and Razi during the POR and, as adverse facts available, we applied a benchmark interest rate of 24 percent, which the Government of the Islamic Republic of Iran (GOI) reported in its questionnaire responses was the highest lending rate a commercial bank in Iran would charge pistachio producers. However, information obtained from Nima since the Preliminary Results revealed that Nima had mistakenly reported that Razi had received the loan in 2003, when, in fact, the loan was received outside of the POR. For further discussion, see Comment 2: Application of Adverse Facts Available to Provision of Credit Program, below. Therefore, for purposes of these final results, we find that the provision of credit program was not used by Nima and/or Razi during the POR, which marks a change from our Preliminary Results.

For the purposes of these final results, we find that the programs listed below were not used by Nima and/or Razi during the POR.

1. Provision of Fertilizer and Machinery
2. Provision of Credit
3. Tax Exemptions
4. Provision of Water and Irrigation Equipment
5. Technical Support
6. Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods
7. Program to Improve Quality of Exports of Dried Fruit
8. Iranian Export Guarantee Fund
9. GOI Grants and Loans to Pistachio Farmers
10. Crop Insurance for Pistachios

II. Total Ad Valorem Rate

The total net subsidy rate for Nima and its grower/exporter, Razi, for the review period 2003 is 0.00 percent ad valorem.

III. Analysis of Comments

Comment 1: Termination of the Review

Petitioners¹ assert that the Department should terminate the instant review due to the lack of evidence on the record showing that Nima exported roasted pistachios, i.e., subject merchandise, to the United States during the POR. Petitioners claim that Iran is a member of the International Convention on the Harmonized Commodity and Coding System (the Convention), whereby all members agree to apply the same harmonized tariff schedule six-digit prefix to products subject to international trade. Petitioners further argue that as a member of the Convention, Iran is required to classify the subject merchandise under Harmonized Tariff Schedule (HTS) item number 2008.19. However, petitioners state, the record contains no evidence of Nima exporting to the United States merchandise classified under HTS item number 2008.19 during the POR.

Citing Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany, petitioners argue that the Department terminated a CVD administrative review under similar circumstances because the sole respondent company did not export any subject merchandise to the United States during the review period.² Therefore, argue petitioners, given the fact that the record of the instant review contains only Nima's assertions and does not contain any official government documents or statistics supporting exports of the subject merchandise to the United States during the POR, the Department must, consistent with past practice, terminate the instant review.

Respondents did not comment on this issue.

The Department's Position:

We disagree with petitioners that we should terminate the instant review. Petitioners' reliance on HTS item number 2008.19 is misplaced. Harmonized Tariff Schedule of the United States (HTSUS) item number 2008.19.30.20 generally covers pistachios, but is not specific to "in-shell pistachios," i.e., the subject merchandise. On the other hand, the scope of the order on roasted in-shell pistachios reads, "the product covered by this order is all roasted in-shell pistachio nuts, whether roasted in Iran or elsewhere, from which the hull has been removed, leaving the inner hard shells and the edible meat, as currently classifiable in the HTSUS under

¹ Petitioners include the California Pistachios Commission (CPC) and its members, as well as a domestic interested party, Cal Pure Pistachios, Inc. (Cal Pure).

² See Certain Hot-rolled Lead and Bismuth Carbon Steel Products from Germany: Notice of Termination of Countervailing Duty Administrative Review, 64 FR 44489 (August 16, 1999).

item number 0802.50.20.00. The written description of the scope of this proceeding is dispositive.” HTSUS item number 0802.50.20.00 is very specific, applying solely to “in-shell pistachios.” Therefore, the scope of the order is far more exact and specific than the broad, overarching classification relied upon by the petitioners. Thus, we find no merit in their claims that respondents did not make any shipments of subject merchandise to the United States during the POR, as those claims rely on import data which most likely covers merchandise not covered by the scope of the order.

Furthermore, there is ample evidence on the record, e.g., respondents’ financial statements, cancelled checks, airway bills, customs entry documents, and invoices, demonstrating that Nima did make shipments of subject merchandise to the United States during the POR. See, e.g., Nima’s March 31, 2005, supplemental questionnaire response at Exhibits 2 and 4.

Because there is no evidence on the record to support petitioners’ allegations that respondents did not make shipments of subject merchandise to the United States during the POR, we find no basis to terminate the instant review.

Comment 2: Application of Adverse Facts Available to the Provision of Credit Program

Petitioners argue that, with respect to the provision of credit program, Nima has repeatedly denied that either it or Razi received any loans or credit from the GOI during the POR. However, petitioners point out that Nima later changed its position by stating in its October 12, 2005, supplemental questionnaire response that Razi did obtain a loan from the Bank of Agriculture on December 13, 2003. In a subsequent supplemental questionnaire response, Nima stated that it had made a mistake in reporting the date of receipt of the loan as December 13, 2003, and that it was actually received on January 13, 2004.

Moreover, petitioners argue, the GOI has denied extending credit to either Nima or Razi during the POR; instead, the GOI has stated that the only loans it provides to the pistachio industry are given to pistachio processing terminals. Petitioners argue that the GOI has not provided documentation of this limitation. Moreover, petitioners assert that, given Nima’s and the GOI’s repeated denials, respondents have failed to provide the Department with the minimum information required in CVD proceedings and it is impossible to determine whether the program provided benefits only to pistachio processing terminals or also to producers of pistachios in Iran. Petitioners maintain that without any ability to resolve this contradiction, due to the GOI’s failure to explain in more detail the nature of this subsidy program, the Department is required to apply facts available by determining that Nima or Razi did receive preferential credit during the POR.

Respondents did not comment on this issue.

The Department’s Position:

In prior CVD proceedings where a government has responded on behalf of a non-responding company, the Department has used the government response to the extent that it serves to establish non-use of certain programs. See, e.g., Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Belgium, 58 FR 37273, 37274 (July 9, 1993); Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia, 64 FR 73155, 73155 and 73162; and Final Affirmative Countervailing

Duty Determination: Stainless Steel Bar From Italy, 67 FR 3163 (January 23, 2002), and accompanying Issues and Decision Memorandum at Comment 1. The aforementioned cases all involve instances in which the foreign governments provided non-use information regarding non-responding companies. On the other hand, in CVD administrative reviews, if a respondent has claimed that it can establish non-use of a program as a factual matter, without an accompanying or complete government response, the Department has determined that it will analyze the responses provided by the company to determine if the information on the record is sufficient to establish non-use. In the instant case, we find that the companies involved have provided sufficient information with which the Department has been able to establish non-use.

We disagree with petitioners that with respect to the provision of credit program, the Department should resort to the use of adverse facts available. Although Nima originally reported in the narrative section of its October 12, 2005, supplemental questionnaire response that Razi received a loan from the Bank of Agriculture on December 13, 2003, the loan document from the Bank of Agriculture that Nima submitted at Exhibit Four of its response indicated that the date of the loan was January 13, 2004, which is outside of the POR. Nima corrected this discrepancy in its January 26, 2006, supplemental questionnaire response, where it explained that the correct date of receipt of the loan was in fact January 13, 2004, not December 13, 2003, as originally reported. Documentation on the record of the instant review supports Nima's corrected statement. Because the loan in question falls outside of the review period for the instant administrative review, for the purposes of these final results, we find that Nima did not use the provision of credit program during the POR.

Comment 3: Application of Adverse Facts Available to the Provision of Fertilizer and Machinery Program

In past new shipper reviews of this CVD order,³ petitioners argue, the Department applied adverse facts available with respect to the provision of fertilizer and machinery program because the GOI failed to provide documentation corroborating its statement that it had eliminated the program in 1992 and because Nima failed to demonstrate that its grower, Maghsoudi Farms, had not received non-recurring benefits during the POR and during the nine preceding years. See Pistachios New Shipper Reviews at Comment 7. Petitioners maintain that similar failures have occurred in this review, and thus, the application of adverse facts available is again required.

Petitioners argue that although Nima, and Nima on behalf of Razi, has repeatedly denied receiving any fertilizer, machinery, pesticides, or any capital inputs during the POR or during the nine preceding years, Nima has failed to fully respond to the Department's requests for information regarding this program. Moreover, petitioners assert that despite the GOI's denial that neither Nima nor Razi benefitted from this program, the GOI never responded to the Department's request for an explanation of the program, nor did the GOI provide a detailed description of the records it maintains with respect to this program, as required by the Department's questionnaire. Therefore, petitioners maintain, in order to uphold the substantial

³ Certain In-shell Pistachios and Certain Roasted In-shell Pistachios from the Islamic Republic of Iran: Final Results of New Shipper Countervailing Duty Reviews, 68 FR 4997 (January 31, 2003), and the accompanying Issues and Decision Memorandum (Pistachios New Shipper Reviews).

evidence standard and to be consistent with the Pistachios New Shipper Reviews, the Department should apply adverse facts available and find that Nima and Razi received countervailable benefits under this program, as a denial by Nima is not enough.

Respondents did not comment on this issue.

The Department's Position:

We disagree with petitioners that we should apply adverse facts available with respect to the provision of fertilizer and machinery program. Nima and Razi repeatedly stated that they did not use this program nor did they apply for or receive benefits from this program during the POR. We have analyzed Nima and Razi's financial records submitted on the record of the instant review and have found no evidence to contradict respondents' statements of non-use.

Here, petitioners' reliance on the Pistachios New Shipper Reviews is misplaced. Although we did apply partial adverse facts available in the Pistachios New Shipper Reviews, we based our decision to apply partial adverse facts available on the failure of Nima and its grower at the time, Maghsoudi Farms, to provide information regarding Maghsoudi Farms' production facilities in the manner explicitly and repeatedly requested by the Department. We did not apply adverse facts available based on the failure of the GOI to respond to the Department's requests for information. See Pistachios New Shipper Reviews at Comment 1.

Section 782(e) of the Tariff Act of 1930, as amended (the Act), provides that the Department shall not decline to consider information which does not meet all applicable requirements established by the Department, but is nonetheless usable and meets articulated standards. In this case, we determine that respondents have met the criteria necessary for us to consider the information they submitted on the record. Specifically, we find that the information Nima and Razi submitted was (1) timely, (2) verifiable, to the extent that it was within the respondents' ability to perform verification, (3) able to serve as a reliable basis on which to base our Final Results, (4) provided in a manner that indicates that Nima and Razi were acting to the best of their ability to meet the requirements established by the Department, and (5) was not unduly difficult to use.

We acknowledge that the GOI's description and documentation of the programs in the instant review were not complete. In the ongoing and future reviews, we will continue to seek full information from the GOI concerning the manner in which these programs operate and the extent to which they provide benefits to exporters and/or the pistachio industry. However, on balance, we find that the information supplied by the GOI and the respondent companies in the instant review can be relied upon for the purposes of our analysis. Accordingly, there is no need to apply the provisions of sections 776(a) or (b) of the Act in this case. Thus, we find that neither the application of facts available, nor an adverse inference, is warranted in the instant review.

Comment 4: Application of Adverse Facts Available to the Tax Exemptions Program

Petitioners argue that although the GOI has denied that it provides a tax exemption to pistachio growers or exporters, it has not provided the evidence needed to support this claim. Petitioners maintain that the GOI had an obligation to establish, through the submission of laws and regulations, that it did not provide a tax exemption to respondents during the POR.

Petitioners also state that although the GOI provided Article 81 of its tax law, as amended through January 1999, which contains the tax exemption, the GOI did not provide evidence of the revocation of the tax exemption. Moreover, petitioners argue that Nima denied that Razi was subject to taxation during the POR and Nima only provided an illegible and partial copy of its tax return. Therefore, petitioners maintain that respondents have failed to provide the minimum information required and the Department is required to apply adverse facts available by finding that Nima and Razi were exempted from Iranian income tax during the POR.

Respondents did not comment on this issue.

The Department's Position:

We disagree with petitioners that we should apply adverse facts available with respect to this program. Nima and Razi repeatedly stated that they did not use this program nor did they apply for or receive benefits from this program during the POR. We have analyzed Nima and Razi's financial records submitted on the record of the instant review and have found no evidence to contradict respondents' statements of non-use.

We find that the companies involved have provided sufficient information with which the Department has been able to establish non-use. Accordingly, there is no need to apply the provisions of sections 776(a) or (b) of the Act in this case. Thus, we find that neither the application of facts available, nor an adverse inference, is warranted in the instant review.

Comment 5: Application of Adverse Facts Available to the Provision of Water and Irrigation Equipment Program

Petitioners state that Nima, on behalf of Razi, denied that Razi received any assistance from the GOI in the form of soil dams, flood barriers, canals, and/or other irrigation projects. Petitioners also assert that Nima did not comply with the Department's requests that it submit a fully translated copy of one of Razi's water bills paid during the POR. Petitioners argue that although the GOI denied providing benefits to respondents under this program, the GOI failed to provide the Department with an explanation of this program and a detailed description of the records that the GOI maintains with respect to this program. Petitioners further argue that the GOI did not comply with the Department's request for a copy of "GOI regulation 34/709" that allegedly requires pistachio farmers to pay a water surcharge.

Petitioners assert that in the new shipper reviews, the Department found two deficiencies in the respondents' submissions that warranted the application of adverse facts available with respect to this program. See Pistachios New Shipper Reviews at Comment 9. Specifically, petitioners maintain that in the new shipper reviews, the GOI did not provide the necessary documentation to support its claim that this program had been terminated. Furthermore, they claim that, in the new shipper reviews, Nima did not provide evidence that its grower, Maghsoudi Farms, had not benefitted from this non-recurring subsidy program in the POR or the nine preceding years. In those reviews, argue petitioners, the Department stated that it would reconsider the GOI's claims regarding the termination of this program in subsequent proceedings as long as the GOI supported its claim with the appropriate documentation, *i.e.*, copies of the

legislation that terminated the program. Petitioners maintain that in the instant review, respondents have not provided appropriate documentation.

For these reasons, petitioners argue that the application of adverse facts available is warranted.

Respondents did not comment on this issue.

The Department's Position:

We disagree with petitioners that we should apply adverse facts available with respect to the provision of water and irrigation equipment program. Nima and Razi repeatedly stated that they did not use this program nor did they apply for or receive benefits from this program during the POR. We have analyzed Nima and Razi's financial records submitted on the record of the instant review and have found no evidence to contradict respondents' statements of non-use.

Moreover, as stated above in Comment 3, petitioners' reliance on the Pistachios New Shipper Reviews is misplaced. Although we applied partial adverse facts available in the Pistachios New Shipper Reviews, we based our decision to apply partial adverse facts available on the failure of Nima and its grower at the time, Maghsoudi Farms, to provide information regarding Maghsoudi Farms' production facilities in the manner explicitly and repeatedly requested by the Department. We did not apply an adverse inference based on the failure of the GOI to respond to the Department's requests for information. See Pistachios New Shipper Reviews at Comment 1.

We agree with petitioners that the GOI has not, to date, provided the appropriate documentation to establish that the provision of water and irrigation equipment program has been terminated. For the purposes of the instant review, we are finding that the respondent companies did not use this program, not that the program was terminated. We will continue to examine this program in all ongoing and future reviews, and we will continue to seek out full information from the GOI concerning the manner in which this program operates and the manner in which this program may provide benefits to exporters and/or the pistachio industry.

We find that the companies involved have provided sufficient information with which the Department has been able to establish non-use. Accordingly, there is no need to apply the provisions of sections 776(a) or (b) of the Act in this case. Thus, we find that neither the application of facts available, nor an adverse inference, is warranted in the instant review.

Comment 6: Application of Adverse Facts Available to the Technical Support Program

Petitioners state that Nima, on behalf of Razi, denied that Razi ever received scientific help from the GOI. Moreover, petitioners assert, the GOI denied providing technical support to Nima or its grower during the POR. Petitioners argue that the Department erred in its preliminary finding when it accepted these denials by the respondents because technical support can be given in the form of either cash or other in-kind assistance. Petitioners also assert that the acknowledgment by respondents of a Pistachio Research Institute of Iran, which was established in 1993 to research agricultural diseases and pests, does not reconcile with the GOI's assertions that there is not a technical support program for pistachio farmers.

Petitioners maintain that respondents' denial of the provision or receipt of benefits under this program does not constitute substantial evidence that no benefits were conveyed. Therefore, petitioners urge the Department to apply adverse facts available.

Respondents did not comment on this issue.

The Department's Position:

We disagree with petitioners that we should apply adverse facts available with respect to the technical support program. Nima and Razi repeatedly stated that they did not use this program nor did they apply for or receive benefits from this program during the POR. We have analyzed Nima and Razi's financial records submitted on the record of the instant review and have found no evidence to contradict respondents' statements of non-use.

Moreover, we note that there is no evidence on the record to support petitioners' assertion that the technical support program could include in-kind assistance. Absent any evidence on the record of the instant review to support the claim that Nima or Razi received any in-kind assistance, we find that no in-kind benefits were received by either Nima nor Razi during the POR.

We find that the companies involved have provided sufficient information with which the Department has been able to establish non-use. Accordingly, there is no need to apply the provisions of sections 776(a) or (b) of the Act in this case. Thus, we find that neither the application of facts available, nor an adverse inference, is warranted in the instant review.

Comment 7: Application of Adverse Facts Available to the Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods Program

Petitioners argue that although Nima responded that neither it nor Razi received benefits under this program during the POR, Nima failed to answer the appropriate appendices attached to the Department's questionnaires. Moreover, petitioners assert that the GOI provided little information in response to the Department's requests for information on this program. Petitioners point out that the GOI had an obligation to demonstrate with evidence that it had either terminated the program or had not provided benefits under the program to Nima or Razi. Having failed to do so, petitioners argue that the Department must apply adverse facts available.

Respondents did not comment on this issue.

The Department's Position:

We disagree with petitioners that we should apply adverse facts available with respect to this program. Nima and Razi repeatedly stated that they did not use this program nor did they apply for or receive benefits from this program during the POR. We have analyzed Nima and Razi's financial records submitted on the record of the instant review and have found no evidence to contradict respondents' statements of non-use.

We find that the companies involved have provided sufficient information with which the Department has been able to establish non-use. Accordingly, there is no need to apply the

provisions of sections 776(a) or (b) of the Act in this case. Thus, we find that neither the application of facts available, nor an adverse inference, is warranted in the instant review.

Comment 8: Application of Adverse Facts Available to the Program to Improve Quality of Exports of Dried Fruit

With respect to this program, petitioners argue that although the GOI claimed in its questionnaire response in the instant review that it had never implemented this program, it has not provided any support for this allegation. Petitioners point out that in the new shipper reviews, the Department applied adverse facts available with respect to this program even though the GOI claimed that this program pertained exclusively to dried fruit, *i.e.*, non-subject merchandise. However, petitioners state, in those reviews, the Department rejected the GOI's claim because the GOI was unable to provide the necessary documentation to support its claim. See Pistachios New Shipper Reviews at Comment 12.

Petitioners further argue that there is insufficient evidence on the record of the instant review to determine whether the program exists, but does not cover pistachios, or whether it does not exist altogether because it has not been implemented. Petitioners assert that, given these circumstances, the Department is obligated to apply adverse facts available with respect to this program.

Respondents did not comment on this issue.

The Department's Position:

We disagree with petitioners that we should apply adverse facts available with respect to this program. Nima and Razi repeatedly stated that they did not use this program nor did they apply for or receive benefits from this program during the POR. We have analyzed Nima and Razi's financial records submitted on the record of the instant review and have found no evidence to contradict respondents' statements of non-use.

As stated above in Comment 3, we note that the fact pattern in the Pistachios New Shipper Reviews was different than in the instant review. In those reviews, we applied partial adverse facts available based on the failure of Nima and its grower to provide information regarding the grower's production facilities in the manner explicitly and repeatedly requested by the Department. We did not apply adverse facts available in those reviews based on the failure of the GOI to respond to the Department's requests for information.

We find that the companies involved have provided sufficient information with which the Department has been able to establish non-use. Accordingly, there is no need to apply the provisions of sections 776(a) or (b) of the Act in this case. Thus, we find that neither the application of facts available, nor an adverse inference, is warranted in the instant review.

Comment 9: Application of Adverse Facts Available to the Iranian Export Guarantee Fund

Petitioners state that Nima, and Nima on behalf of Razi, denied that either entity applied for, received, or accrued any benefit under this program at any time during or prior to the POR.

Moreover, they argue that the GOI failed to respond in a meaningful way to the Department's requests for information on this program. Specifically, petitioners assert that the GOI did not provide a detailed explanation of the records it maintains with respect to this program, nor did it indicate whether Nima or Razi applied for or accrued benefits under this program. Petitioners maintain that, assuming the receipt of benefits was contingent upon export, Nima could have accrued benefits even if Nima did not apply for or otherwise receive them during the POR. Petitioners argue that, given the failure of the GOI to adequately respond to the Department with respect to this program, the Department cannot determine whether this program is specific or whether Nima received benefits under this program during the POR. Therefore, petitioners urge the Department to apply adverse facts available with respect to this program.

Respondents did not comment on this issue.

The Department's Position:

We disagree with petitioners that we should apply adverse facts available with respect to this program. Nima and Razi repeatedly stated that they did not use this program nor did they apply for or receive benefits from this program during the POR. We have analyzed Nima and Razi's financial records submitted on the record of the instant review and have found no evidence to contradict respondents' statements of non-use.

We find that the companies involved have provided sufficient information with which the Department has been able to establish non-use. Accordingly, there is no need to apply the provisions of sections 776(a) or (b) of the Act in this case. Thus, we find that neither the application of facts available, nor an adverse inference, is warranted in the instant review.

Comment 10: Application of Adverse Facts Available to the GOI Grants and Loans to Pistachio Farmers Program

With respect to this program, petitioners argue that although Nima, and Nima on behalf of Razi, denied receiving any grants or loans from the GOI, and although the GOI denied giving any loans or loan guarantees to respondent companies, the respondents have failed to provide the minimum information required by the Department. Therefore, petitioners argue, the application of adverse facts available with respect to this program is warranted.

Respondents did not comment on this issue.

The Department's Position:

We disagree with petitioners that we should apply adverse facts available with respect to this program. Nima and Razi repeatedly stated that they did not use this program nor did they apply for or receive benefits from this program during the POR. We have analyzed Nima and Razi's financial records submitted on the record of the instant review and have found no evidence to contradict respondents' statements of non-use.

We find that the companies involved have provided sufficient information with which the Department has been able to establish non-use. Accordingly, there is no need to apply the

provisions of sections 776(a) or (b) of the Act in this case. Thus, we find that neither the application of facts available, nor an adverse inference, is warranted in the instant review.

Comment 11: Application of Adverse Facts Available to the Crop Insurance for Pistachios Program

Petitioners maintain that although Nima denied that either it or Razi received any benefits under this program, it did not respond to all of the Department's requests for information on this program. Moreover, petitioners point out that the GOI denied that it provided any grants to Nima or Razi, denied that it provided any insurance subsidies to farmers during the POR, and denied that it provided Nima or Razi with crop insurance subsidies during the POR. However, petitioners maintain that the GOI did not provide the Department with the minimum information required by the Department in CVD proceedings. Petitioners urge the Department to disregard the GOI's statements that Razi did not benefit from this program. Accordingly, they argue that application of adverse facts available is warranted.

Respondents did not comment on this issue.

The Department's Position:

We disagree with petitioners that we should apply adverse facts available with respect to this program. Nima and Razi repeatedly stated that they did not use this program nor did they apply for or receive benefits from this program during the POR. We have analyzed Nima and Razi's financial records submitted on the record of the instant review and have found no evidence to contradict respondents' statements of non-use.

We find that the companies involved have provided sufficient information with which the Department has been able to establish non-use. Accordingly, there is no need to apply the provisions of sections 776(a) or (b) of the Act in this case. Thus, we find that neither the application of facts available, nor an adverse inference, is warranted in the instant review.

Comment 12: Adherence to the Department's Deadlines and Service Requirements

Petitioners maintain that during the course of the instant review, respondents have repeatedly failed to adhere to the Department's regulations with respect to response deadlines⁴ and service requirements.⁵ Specifically, petitioners argue that in its September 30, 2005, supplemental questionnaire response, Nima granted itself a ten-day extension to respond to several of the Department's questions. Yet, Nima did not meet its self-created deadline and filed its supplemental response twelve days late. Moreover, petitioners point out that in Nima's January 26, 2006, supplemental questionnaire response, Nima granted itself a six-day extension to respond to certain of the Department's questions.

⁴ See 19 CFR 351.301(c)(2).

⁵ See 19 CFR 351.303(f)(1).

Furthermore, petitioners argue that Nima has failed to adhere to the Department's regulatory requirements for service of documents. Petitioners maintain that Nima failed to serve counsel for the CPC with copies of two supplemental questionnaire responses, thereby hindering the ability of petitioners to provide comments in time to be considered for the Department's preliminary results. Petitioners further argue that in certain filings, Nima also failed to comply with the Department's regulations requiring that each document filed include a certificate of service. For these reasons, petitioners argue that the Department must find that Nima and the GOI have failed to adhere to the Department's regulations in the instant review.

Respondents did not comment on this issue.

The Department's Position:

Regarding petitioners' contention that the respondents failed to adhere to the Department's regulations, we note that section 782(c)(2) of the Act states that the Department:

shall take into account any difficulties experienced by interested parties, particularly small companies in supplying information requested by the administering authority. . .in connection with investigations and reviews under this title, and shall provide to such interested parties any assistance that is practicable in supplying such information.

The Preamble to the regulations states that, with respect to the standard described under section 782(c)(2) of the Act, the Department may apply an adverse inference under 776(b) of the Act where it finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information." See Preamble, Antidumping Duties, Countervailing Duties; Final Rule, 64 FR 27295, 27334 (May 19, 1997) ("Preamble"). The Preamble further states that, "under this standard the Department may consider the size of a company in determining whether it acted to the best of its ability. Any decision to do so would be made on a case-by-case basis." Id. at 27335.

The facts of this proceeding clearly indicate that Nima is a small company. Furthermore, as discussed in Comments 2 through 11 above, we find that Nima has cooperated to the best of its ability and that neither the application of facts available nor an adverse inference is warranted. We further note that the timeliness of certain information submitted by Nima has not, in this particular case, impeded the Department's ability to conduct the administrative review nor, in our judgment, has it prejudiced petitioners from arguing the merits of their case before the Department. Therefore, taking into account the size of Nima's operations, the fact that Nima has cooperated during this segment of the proceeding, that it has not interfered with petitioners' ability to fully participate in this review, and that it has not interfered with the Department's ability to conduct the administrative review, we have determined, in this particular instance, not to reject the questionnaire responses submitted by Nima.

The record shows that Nima failed to include a certificate of service with one of its questionnaire responses. With respect to that one document, the Department determined it appropriate to nonetheless accept the *pro se* respondent's response on the record. However, we do not believe that petitioners, or any party, were unfairly prejudiced by allowing this document to remain on the record. As we explained in our March 15, 2006, response letter to petitioners, if

they had not received a copy of the submission, they should have contacted the Department, informed us of the missing document, and the Department would have worked with them to address the problem. In fact, in the instant proceeding, this is exactly what the petitioners did with respect to another document, and the Department was willing to provide a copy of the two page submission in question to them. Had petitioners believed that their ability to analyze and respond to Nima's responses was impeded in any way by respondent's failure to include a certificate of service, they could also have formally requested an extension of time from the Department within which to file their comments. No such requests for extensions were made.

Therefore, we disagree with petitioners that Nima impeded the instant proceeding by failing to include a certificate of service with one of its documents which was accepted on the record or otherwise failing to adhere to the Department's regulatory requirements.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the determination in the Federal Register.

Agree

Disagree

David M. Spooner
Assistant Secretary
for Import Administration

Date